

National Labor Relations Board

Memorandum



To: Interested Parties
Fr: Ed Egee, Director, OCPA
Date: December 17, 2019
Re: Calendar Year 2019 – Board Actions

As we close out 2019, I wanted to share some of the many accomplishments of the Board this calendar year. Below I've listed the rulemakings underway at the Board and summarized some of our most impactful cases.

Case Processing

The Board issued 303 decisions in contested cases during FY 2019. Adopting a case processing pilot program, the Board committed itself to expediting cases in order to better serve the parties and the American public. The median age of all cases pending before the Board was reduced from 233 days in FY 2018 to 157 days at the end of FY 2019, an almost 33% reduction. In addition, the Board significantly reduced the number of cases pending before the Board to its lowest level since 2012. As of the end of FY2019, the number of pending cases was reduced from 281 at the end of FY 2018 to 227 currently, a reduction of almost 20%.

Similarly, our Regional Offices made exceptional strides, reducing the time of filing to disposition of unfair labor practice cases from 90 to 74 days, a decrease of 17.5% and the time from informal settlement to final disposition of an unfair labor practice case from 173 to 153 days, a decrease of 11.5%.

Rulemakings

Joint Employer Standard

The Board issued a Notice of Proposed Rulemaking (NPRM) regarding the standard for determining joint employer status in September 2018. The Board received nearly 29,000 comments. This significant number of comments reflects the public's strong interest in the Board providing greater clarity in this important area of the law. The Agency is currently reviewing those comments in its consideration of the issuance of a Final Rule on this topic.

Election Protection

On August 12, 2019, the Board issued an NPRM proposing three amendments to the representation election rules to better protect employees' statutory right of free choice by

removing unnecessary barriers to the fair and expeditious resolution of such questions through the preferred means of Board-conducted secret-ballot elections:

- **Blocking Charge Policy:** The NPRM proposes replacing the current blocking charge policy with a vote-and-impound procedure. As proposed, elections would no longer be blocked by pending unfair labor practice charges (ULPs), but the ballots would be impounded until the charges are resolved.
- **Voluntary Recognition Bar:** The NPRM proposes returning to the rule of Dana Corp., 351 NLRB 434 (2007). As proposed, unit employees must receive notice that voluntary recognition has been granted and provide a 45-day open period within which to file an election petition.
- **Section 9(a) Recognition in the Construction Industry:** The NPRM proposes that in order to prove the establishment of a Section 9(a) relationship in the construction industry and the existence of a contract bar to an election, extrinsic evidence is required to demonstrate that recognition was based on a contemporaneous showing of majority employee support.

Student Rule

On September 23, 2019, the Board published a NPRM proposing to exclude from coverage under Section 2(3) of the NLRA students who perform services for financial compensation in connection with their studies at private colleges and universities. The basis for this proposed rule is the Board's current position, subject to public comment, that the relationship undergraduate and graduate students have with their school is predominately educational, rather than economic.

Representation Election Rules

On December 13, the Board announced a final rule instituting a series of modifications to the Agency's representation case procedures. Retaining the essentials of the Agency's existing representation rules, the selective changes create a fairer and more-efficient election process. The modifications include clarifications to procedures prior to an election that better ensure the opportunity for litigation and resolution of unit scope and voter eligibility issues. The changes also permit parties additional time to comply with the various pre-election requirements instituted in 2014.

Cases

MV Transportation, Inc.

The Board adopted the "contract coverage" standard for determining whether a unionized employer's unilateral change in a term or condition of employment violates the Act. In doing so, the Board overruled the "clear and unmistakable waiver" standard, which had been rejected by several federal courts of appeals. Under the "contract coverage" standard, the Board will examine the plain language Management's Discussion and Analysis of the parties' collective-bargaining agreement to determine whether the change made by the employer was within the compass or scope of contractual language granting the employer the right to act unilaterally. If it was, the Board will honor the plain terms of the parties' agreement and the employer will not have violated the Act by making the change without bargaining. If the agreement does not cover the employer's disputed action, the employer will have violated the Act unless it demonstrates that the union waived its right to bargain over the change or that it was privileged to act

unilaterally for some other reason. Applying the contract coverage standard retroactively, the majority found that some of the Respondent's disputed changes to work policies (concerning the addition of light duty work assignments and the setting of disciplinary standards for safety, schedule adherence, security sweeps/breaches, and driving) fell within the compass or scope of language in the collective bargaining agreement that granted the Respondent the right to assign employees, to discipline employees, and to issue reasonable rules and policies related to employee discipline. Accordingly, the Board found that the Respondent did not violate the Act by unilaterally implementing these work policies.

SuperShuttle DFW, Inc.

The Board overruled *FedEx Home Delivery*, 361 NLRB 610 (2014), and returned to the common-law agency test for determining independent-contractor status. The Board found that the FedEx majority impermissibly diminished the significance of entrepreneurial opportunity in the Board's independent contractor analysis and had instead revived an "economic dependency" standard that Congress explicitly rejected with the Taft-Hartley amendments of 1947. Consistent with the Supreme Court's decision in *NLRB v. United Insurance Co. of America*, 390 U.S. 254 (1968), the Board reiterated that when making independent-contractor determinations, the Board will consider all of the common-law factors in the total factual context of each case. Applying the common-law test to this case, the Board concluded that the franchisees are not statutory employees under the Act, but rather independent contractors excluded from the Act's coverage. The Board found that the franchisees' leasing or ownership of their work vans, their method of compensation, and their nearly unfettered control over their daily work schedules and working conditions provided the franchisees with significant entrepreneurial opportunity for economic gain. The Board found that these factors, along with the absence of supervision and the parties' understanding that the franchisees are independent contractors, outweighed the factors supporting employee status. Therefore, the Board dismissed the representation petition.

Velox Express, Inc.

The Board held that employers do not independently violate Section 8(a)(1) of the Act by misclassifying employees as independent contractors. The Board held that an employer's communication to its workers of its opinion that they were independent contractors does not, standing alone, violate the Act, even if that opinion turns out to be mistaken. The Board found that such communication does not inherently threaten those employees with termination or other adverse action if they engage in activities protected by the Act, nor does it communicate that it would be futile for them to engage in such activities. The Board applied its recent decision in *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019), to find that the workers were employees, not independent contractors, and thus protected by the NLRA. Based on that determination, it held that the employer violated the NLRA when it discharged one of these employees for bringing to management's attention group complaints about the way the employer was treating its workers. The Board majority held, however, that the employer's misclassification of its employees as independent contractors was not a separate violation.

Bexar County for the Performing Arts Center Foundation d/b/a Tobin Center for the Performing Arts

The Board overruled *New York New York Hotel & Casino*, 356 NLRB 907 (2011) and held that contractor employees generally are not entitled to the same Section 7 property access rights as the property owner's own employees. Instead, a property owner may exclude from its property

off-duty employees of an onsite contractor seeking access to the property to engage in Section 7 activity unless (i) those employees work regularly and exclusively on the property, and (ii) the property owner fails to show that they have one or more reasonable nontrespassory alternative means to communicate their message. The Board noted that alternative means could include the use of adjacent public property, newspapers, radio, television, billboards, and social media. Applying the new standard, the Board found that the employer did not violate Section 8(a)(1) of the Act by barring off-duty employees of the San Antonio Symphony from leafletting outside of San Antonio's Tobin Center during a performance by the local ballet. The Board found that the Symphony employees did not work exclusively at the Tobin Center and did not regularly conduct business or perform services there. The Board also found the Symphony employees had reasonable alternative nontrespassory channels of communicating their concerns to the theatergoing public.

Kroger Mid-Atlantic

The Board overruled *Sandusky Mall Co.*, 329 NLRB 618 (1999), enf. denied in relevant part 242 F.3d 682 (6th Cir. 2001) and similar cases, which required employers to grant access to nonemployee union agents for any purpose if the employer has allowed substantial civic, charitable, and promotional activities by other nonemployees. Under the Board's new standard, to establish that a denial of access to nonemployee union agents was unlawful, the General Counsel must prove that an employer denied access to other nonemployee union agents while allowing access to other nonemployees for activities similar in nature to those in which the union agents sought to engage. Applying the new standard, the Board held that Kroger was within its rights to remove union representatives from the parking lot of one of its Virginia stores.

McDonald's USA, LLC, a joint employer, et al. and Fast Food Workers Committee and Service Employees International Union, CTW, CLC, et al.

The Board instructed an administrative law judge to approve settlements resolving complaints against McDonald's USA LLC, McDonald's Restaurants of Illinois, Inc., and 29 franchisees, based on violations allegedly committed by McDonald's Restaurants of Illinois and the franchisees. After nearly three years of proceedings, the General Counsel and McDonald's USA, LLC presented a series of informal settlement agreements resolving all the alleged unfair labor practices. An administrative law judge denied their motions to approve the settlement agreements. On special appeal, the Board vacated the judge's order, and remanded the case to the judge with instructions to approve the settlement agreements. Applying the "reasonableness" factors set forth in *Independent Stave*, 287 NLRB 740 (1987), the majority found, contrary to the judge, that the settlement agreements are reasonable, that they provide a full remedy to all affected employees, and that accepting the settlement agreements would serve the policies underlying the Act as well as the Board's longstanding policy of encouraging the amicable resolution of disputes. The settlements do not impose joint and several liability on McDonald's USA, LLC as a joint employer; however, they impose obligations on McDonald's USA, LLC to support the remedies agreed to by McDonald's Restaurants of Illinois and the franchisees.

Valley Hospital Medical Center, Inc. d/b/a Valley Hospital Medical Center

In this case, the Board overruled 2015 changes governing dues checkoff obligations when a collective bargaining agreement ends, restoring precedent that had been in place since 1962. The Board held that an employer's statutory obligation to check off union dues ends upon expiration of the collective-bargaining agreement containing the checkoff provision. The majority

found that dues checkoff provisions belong in the limited category of mandatory-bargaining subjects that are exclusively created by the contract and are enforceable through Section 8(a)(5) of the National Labor Relations Act only for the duration of the contractual obligation created by the parties. In the majority's view, there is no independent statutory obligation to check off and remit employees' union dues after the expiration of the collective-bargaining agreement even where the contract does not contain a union-security provision. The decision overturns *Lincoln Lutheran of Racine*, 362 NLRB 1655 (2015), and returns Board precedent to the rule established under *Bethlehem Steel*, 136 NLRB 1500 (1962).

Apogee Retail LLC d/b/a Unique Thrift Store

In this case, the Board held that work rules requiring confidentiality during the course of workplace investigations are presumptively lawful. The case overturns a 2015 decision, which had placed difficult limits on confidentiality during investigations inconsistent with EEOC regulations. *Banner Estrella Medical Center*, 362 NLRB 1108 (2015), enf. denied on other grounds, 851 F.3d 35 (D.C. Cir. 2017). The Board majority found that the framework set forth in *Banner Estrella* improperly placed the burden on the employer to determine whether its interests in preserving the integrity of an investigation outweighed presumptive employee Section 7 rights, contrary to both Supreme Court and Board precedent. Under the test announced today, the Board applied the test for facially neutral workplace rules established in *The Boeing Co.*, 365 NLRB No. 154 (2017), and determined that investigative confidentiality rules restricted to the duration of an internal investigation are generally lawful. The Board held that the prior test was inconsistent with other federal guidance, including EEOC regulations requiring an employer to provide confidentiality assurances throughout sensitive discrimination investigations, and failed to consider the importance of the employer's confidentiality assurances to both employers and employees during an ongoing investigation. Because the rules at issue in this case did not limit the application of the confidentiality provisions to the duration of the investigation, the majority remanded this case for further consideration.

Caesar's Entertainment

In this case, the Board overturned *Purple Communications, Inc.*, 361 NLRB 1050 (2014), and determined that employers have the right to impose nondiscriminatory restrictions on the use of employer-owned IT systems for nonwork purposes, essentially reinstating the Board's decision in *Register Guard*, 351 NLRB 1110 (2007). The majority explained that *Purple Communications* was inconsistent with Board and court precedent finding nondiscriminatory restrictions on the use of employer equipment to be lawful. The majority further explained that the Supreme Court's decision in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945) stands for the twin propositions that employees must have "adequate avenues of communication" in order to meaningfully exercise their Section 7 rights and that employer property rights must yield to employees' Section 7 rights when necessary to avoid creating an "unreasonable impediment to the exercise of the right to self-organization." The majority therefore announced a new standard that respects both employees' Section 7 right to engage in union or other protected concerted communications during the workday and employers' property rights in their equipment by allowing employers to generally prohibit non-work use of their equipment, while creating an exception where the use of such equipment is the only reasonable means for employees to communicate with one another during the workday. The majority applied its holding retroactively and found that Caesars Entertainment did not violate the Act by maintaining its "General Restrictions" on use of its IT resources. The full Board additionally determined to sever and remand a computer confidentiality rule for consideration under *The Boeing Company*, 365 NLRB No. 154 (2017).